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No. 85-1406

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DONALD P. HODEL, SECRETARY OF THE INTERIOR, ET AL.,
Petitioners,

v.

PEOPLE OF THE VILLAGE OF GAMBELL, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE

STATE OF CALIFORNIA ex rel. JOHN K. VAN DE KAMP, ATTORNEY GENERAL

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QUESTION PRESENTED

Whether the Ninth Circuit standard requiring a determination of the likelihood of success on the merits and a balance of the comparative harms in situations involving an agency's evaluation of the environmental impact of a proposed action is consistent with the exercise of equitable discretion mandated by the holding of *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305 (1982).

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Amicus respectfully submits this brief, pursuant to Rule 36.4 of the Rules of the Supreme Court, in support of the respondent, the People of the Village of Gambell.

INTERESTS OF AMICUS

The State of California views this case as one concerning only the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. §§ 3101-3233 (1982). Nonetheless, the Solicitor General in his Petition for Certiorari has presented an issue concerning the applicable standard for the issuance of an injunction so broadly that it implicates amicus's statutory and common law authority to safeguard the public interest of Californians and protect the State's natural resources. *See* Cal. Const. art. V, § 13; Cal. Gov't Code sections 12511, 12600-12; *D'Amico* v. *Board of Medical Examiners,* 11 Cal.3d 1, 14-15, 112 Cal. Rptr. 786, 520 P.2d 10 (1974).

In an attempt to state an issue of sufficient importance to warrant the grant of certiorari, the Solicitor General attacks the Ninth Circuit's language setting forth the standard for issuance of an injunction under ANILCA as applicable to all environmental statutes. Amicus's interest results from the Solicitor General's broad statement of the issue, his attempt to affect all environmental statutes, and his mischaracterization of the Ninth Circuit standard as a per se rule requiring injunctions in all cases. Enforcement of statutes such as the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4337 (1982), affects California significantly, and amicus has played an important role in cases involving interpretation of such statutes. *E.g., California ex rel. Van de Kamp* v. *Tahoe Regional Planning Agency,* 766 F.2d 1308 (9th Cir. 1985); *California* v. *Watt,* 712 F.2d 584 (D.C. Cir. 1983); *California* v. *Block,* 690 F.2d 753 (9th Cir. 1982); *NRDC* v. *Hodel,* 618 F.Supp. 848 (E.D. Cal. 1985).

Because the Solicitor General states the issue as involving all environmental statutes, amicus submits this brief solely to discuss the relation of the standard for injunctions used in *People of the Village of Gambell* v. *Hodel,* 774 F.2d 1414 (9th Cir. 1985), and this Court's holding in *Weinberger* v. *Romero-Barcelo,* 456 U.S. 305 (1982).

REASONS FOR DENYING THE PETITION

The Ninth Circuit standard for the issuance of an injunction in cases involving violations of environmental statutes requires a determination of the balance of irreparable harms. Rather than create a "per se rule" or a mechanical grant of injunction, the Ninth Circuit standard affords protection to the objectives of environmental statutes while allowing flexibility for dealing with unusual cases. As such, the standard is consistent with *Weinberger* v. *Romero-Barcelo,* 456 U.S. 305 (1982), and the cases of other circuits. The Solicitor General's characterization of the standard as an unyielding directive is without basis.

a. The Solicitor General contends that the Ninth Circuit's injunction standard for violation of environment statutes "*requires* the issuance of a preliminary injunction without any consideration of the competing equities" and that it creates an "unprecedented per se injunction rule." Petition of Solicitor General at 12 (emphasis in original). In fact, the Ninth Circuit standard expressed in *People of the Village of Gambell* v. *Hodel,* 774 F.2d 1414 (9th Cir. 1985) (*Gambell*), requires a balancing of harms and equities, as evidenced by the Ninth Circuit cases, including *Gambell,* which employ the test. *See Tenakee Springs* v. *Block,* 778 F.2d 1402, 1407-08 (9th Cir. 1985); *Steamboaters* v. *FERC,* 777 F.2d 1384, 1385-86 (9th Cir. 1985); *Save Our Ecosystems* v. *Clark,* 747 F.2d 1240, 1250 (9th Cir. 1984); *Forelaws on Board* v. *Johnson,* 743 F.2d 677, 685-86 (9th Cir. 1984); *American Motorcyclist Association* v. *Watt,* 714 F.2d 962, 966 (9th Cir. 1983); *Alpine Lakes Protection Society* v. *Schlapfer,* 518 F.2d 1089, 1090 (9th Cir. 1975) (*see* discussion *infra*).

In *Gambell,* the court applied a standard to the irreparable harm balance under ANILCA that it had previously applied to cases arising under NEPA: Where plaintiff shows a strong likelihood of success on the merits, an injunction will issue unless defendant can show unusual circumstances. *Gambell,* 774 F.2d at 1422-23. Because the district court failed to articulate unusual circumstances and because none was evident on the record, the circuit court determined that an injunction

was appropriate in light of the villagers' probable success on the merits as a result of the ANILCA violation. 774 F.2d at 1423, 1424. Rather than applying a per se rule or following a calculus designed to invariably require an injunction, as the Solicitor General suggests, the *Gambell* court considered the facts presented and weighed them with respect to the equities. 774 F.2d at 1423-25.

The Solicitor General really quarrels with the facts in *Gambell*, not with the Ninth Circuit balancing standard: "[t]he Secretary's lease sale plan poses the type of danger to the subsistence culture of Alaska Natives that moved Congress to enact section 810(a) of [ANILCA];" "the district court erred in finding that this is the type of rare or unusual case that justifies denial of a preliminary injunction. . . ."; and "[t]he by-products of oil and gas exploration . . . pose the threat of disruption to subsistence economy sufficient to destroy irreparably the isolated and unique culture of the native Alaskans." 774 F.2d at 1424, 1426.

The Supreme Court decision in *Romero-Barcelo* precludes the mechanical grant of an injunction for every violation of law where the statute does not completely foreclose the exercise of the court's discretion. 456 U.S. at 313, 320; *see TVA* v. *Hill*, 437 U.S. 153, 193 (1978); *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944). The Ninth Circuit's standard, consistent with *Romero-Barcelo*, requires the weighing of equities,

> "authoriz[ing] the court not only to weigh the relative hardship and harms to the parties, but to examine how the greater public interest may be affected in the unusual case where enjoining government action allegedly in violation of [an environmental statute] might actually jeopardize resources."

Gambell, 774 F.2d at 1424, *quoting American Motorcyclist Association* v. *Watt*, 714 F.2d at 966.

This balance mandates, rather than forecloses, the exercise of equitable discretion. In *Romero-Barcelo*, the Court, reviewing the Navy's release of ordnance from aircraft into navigable waters as the basis for an injunction under the Federal Water

Pollution Control Act, 33 U.S.C. §§ 1251-1376 (1982), pointed to the district court's determination that (1) the Navy's control of the release area probably constituted a positive factor in the area's ecology, and (2) because of the Navy's important training functions, injunctive relief would cause grievous harm to the welfare of the Navy and the nation. 456 U.S. at 97 & n. 4. The Ninth Circuit's formulation envisions consideration of exactly such factors.

In *American Motorcyclist* v. *Watt*, 714 F.2d at 966, the court determined that "public concerns other than the failure to comply with NEPA must be weighed in determining whether to grant an injunction." The court in *American Motorcyclist*, citing *Romero-Barcelo*, denied the injunction for fear of resultant permanent damage to fragile desert resources after determining that the district court properly engaged in the "required weighing" and consideration of the public interest. *Id.* at 966-67. Similarly, in *Alpine Lakes Protection Society* v. *Schlapfer*, 518 F.2d at 1090, the Ninth Circuit denied a NEPA injunction because it would lead to timber damage and insect infestation, a harm which the court found, on balance, outweighed the possible reduction of the area's wilderness characteristics. In *Forelaws on Board* v. *Johnson*, 743 F.2d at 686, the court, following its usual balance of equities, denied an injunction as inappropriate in light of disruption of long-term contracts entered into pursuant to another federal act that mandated their implementation with "a certain amount of urgency." These cases obviously do not reflect a per se rule requiring injunctions.

In cases granting injunctions as well, the Ninth Circuit considers the balance of harms. In *Steamboaters* v. *FERC*, 777 F.2d at 1385-86, the court weighed the presumption of harm resulting from a NEPA violation against "the public interest in promoting small hydro-power projects." The court concluded that the NEPA violation weighed more heavily after determining that Congress had not set a time schedule for specific projects as it had done with respect to the contracts considered in *Forelaws on Board*. *See also Save Our Ecosystems* v. *Clark*,

747 F.2d at 1250.* In light of these cases, the Solicitor General's description of the Ninth Circuit's environmental statute injunction standard as a per se rule requiring the grant of an injunction is simply incorrect.

b. By presenting the Ninth Circuit's environmental statute injunction standard as a per se rule, the Solicitor General determines that the "rule" conflicts with other circuits' decisions where those decisions state that harms must be "balanced." Solicitor General's Petition at 19-20. The "conflict" results from the Solicitor General's misstatement of the Ninth Circuit standard as a per se rule. In all of the cases cited by the Solicitor General, the circuit courts have concluded, like the Ninth Circuit, that the objectives of environmental statutes must be considered "to the fullest extent possible" in the balance of harms equation. *E.g., Wisconsin* v. *Weinberger,* 745 F.2d 412, 426 (7th Cir. 1984); *Realty Income Trust* v. *Eckerd,* 564 F.2d 447, 456 (D.C. Cir. 1977) (presumption of injunction for NEPA violation).

In *Massachusetts* v. *Watt,* 716 F.2d 946, 952 (1st Cir. 1983), for example, the court found that "without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent [is] suffered," and that function of NEPA must receive consideration in the balance of harms. Even in *Alaska* v. *Andrus,* 580 F.2d 465, 485-86 (D.C. Cir.), *vacated in part on other grounds as moot sub nom. Western Oil & Gas Association* v. *Alaska,* 439 U.S. 922 (1978), which the *Gambell* court distinguished as applying a different test, the District of Columbia Circuit acknowledged the presumption in favor of injunction in NEPA cases, noting that "it is possible and reasonable for the courts to insist on strict compliance with NEPA. . ." 580 F.2d at 485, *quoting Jones* v. *District of*

* The Solicitor General also cites *Thomas* v. *Peterson,* 753 F.2d 754, 764 (9th Cir. 1985), as an application of the per se rule. In fact, the *Thomas* injunction issued pursuant to the Endangered Species Act, 16 U.S.C. §§ 1531-1543 (1982), the same Act that this court found mandated an injunction. *See TVA* v. *Hill,* 437 U.S. 153, 193 (1978). Because *Thomas* involved the procedural requirements of the ESA, the Ninth Circuit applied its balancing formula to that situation as well, determining that the balance favored the grant of an injunction. 753 F.2d at 764-765.

Columbia Redevelopment Land Agency, 499 F.2d 502, 513 (D.C. Cir. 1974). *See Foundation for Economic Trends* v. *Heckler*, 756 F.2d 143, 157 (D.C. Cir. 1985) (NEPA creates "an extremely important statutory requirement to serve the public and agency *before* major federal action occurs") (emphasis in original).

As the Ninth Circuit formulates it:

> The purpose of enjoining government action pending preparation of the environmental impact statement is, generally, to maintain the *status quo* while additional environmental data is obtained, in order to preserve the decision makers' opportunity to choose among policy alternatives.

Forelaws on Board, 743 F.2d at 685. The Ninth Circuit's environmental statute injunction standard is designed to effect that purpose while enabling the court to weigh the equities and grant or deny an injunction as the facts dictate. The balance is evidenced both in the Ninth Circuit opinions in which the court denies injunctions and in those in which the court grants injunctions. The Ninth Circuit's standard remains consistent with *Romero-Barcelo*.

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: April 22, 1986

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